Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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First Assembly of God of
Naples, Florida, Inc., *Petitioner,*

*v.*

Collier County, a political subdivision
of the State of Florida, *Respondent.*

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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## PETITION FOR A WRIT OF CERTIORARI

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FIRST ASSEMBLY OF GOD
OF NAPLES, FLORIDA, INC.,
Plaintiff-Appellant, Deborah Lynn Cook, John Michael
Webber, Toby Westfall, Etc.,
Brian Knies, Etc., David Reed,
Etc., et al.,
Plaintiffs, v. COLLIER COUNTY, FLORIDA,
Don Hunter, as
Sheriff of Collier County, Florida,
Defendants-Appellees.

FIRST ASSEMBLY OF GOD
OF NAPLES, FLORIDA, INC., v. COLLIER CTY.

No. 93-2399.
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

20 F.3d 419; 1994 U.S. App. LEXIS 9901;
8 Fla. Law W. Fed. C 166

May 5, 1994, Decided

SUBSEQUENT HISTORY:
As Modified August 3, 1994. Petition for Rehearing
and Suggestion for Rehearing En Banc
Denied August 3, 1994, Reported at:
1994 U.S. App. LEXIS 20324.
27 F.3d 526

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of Florida. (No. 91-211-Civ-FTM-23). Sherman G. Finesilver, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For Plaintiff Appellant: Mark R. Dolan, Largo, FL.

For Defendants-Appellees: Maynard W. Schryver, Naples, Fl. For Collier County: Gregory W. Hootman, Sarasota, Florida. M. W. Schryver, Naples, FL. Cindy R. Galen, Elinor E. Erben, Sarasota, FL.

JUDGES: Before COX and DUBINA, Circuit Judges, and CLARK, Senior Circuit Judge.

OPINION BY: DUBINA

OPINION: DUBINA, Circuit Judge:

First Assembly of God ("First Assembly") appeals from the district court's grant of summary judgment in favor of Collier County, Florida ("the County"). Specifically, First Assembly claims that the enactment of a local zoning ordinance violated its rights to procedural due process and free exercise of religion. We hold that the County's zoning laws did not violate First Assembly's constitutional rights of due process or free exercise of religion; therefore, we affirm the district court's grant of

summary judgment for the County.

## I. *FACTS*

First Assembly is a Christian church affiliated with the Assemblies of God of the United States, and located in Naples, Florida. First Assembly was established in 1956 when unincorporated Collier County imposed no zoning ordinances. In 1982, Collier County adopted Zoning Ordinance 82-2, which imposed zoning regulation on all of the unincorporated County. Pursuant to Ordinance 82-2, First Assembly was zoned RMF-6. An RMF-6 district is a multi-family residential district that also permits a number of community uses, including churches and their "customary accessory uses."

In 1985, First Assembly decided to build a new structure on its property, and received permission for the construction. The new building was primarily used as a day care center. In 1989, due to community need, First Assembly converted the building into a homeless shelter. Subsequently, the people of Naples became concerned about the problem of the homeless in their community. The record indicates that homeless people had taken up residence in vacant lots, where the living conditions were unsanitary. As a result, there was great community distress over both health and safety concerns. First Assembly's shelter was, no doubt, seen as part of the problem.

In April of 1991, a county official charged that First Assembly's homeless shelter violated several zoning ordinances. These alleged violations of the local zoning

ordinances were adjudicated by the Collier County Code Enforcement Board ("CEB"). The CEB held five hearings on the matter and ultimately concluded that First Assembly was operating its homeless shelter in violation of several zoning ordinances. The CEB determined that the shelter was not a "customary accessory use" of the church and that the applicable housing and zoning codes did not permit the shelter space to be used as a residence for such a large number of people. In addition, the CEB found that First Assembly had not applied for a provisional permit to maintain a homeless shelter on its premises. Thus, First Assembly was required to close the shelter within three days, or pay a fine of $ 250 per day for each day that the shelter remained open. The shelter is now closed.

## II. *PROCEDURAL HISTORY*

First Assembly, the individual plaintiffs, and the class representatives brought suit against Collier County. Asserting irreparable harm attendant to the loss of the shelter, the plaintiffs sought an ex parte temporary restraining order and a preliminary injunction, as well as permanent injunctive relief.

The temporary restraining order and preliminary injunction were denied, and a renewed motion for a temporary restraining order was filed. The district court held a non-evidentiary hearing and denied the motion. In addition, the court converted the County's motion to dismiss into a motion for summary judgment and ordered

First Assembly to show cause why judgment for the defendants should not issue.

The district court held a hearing on the motion for summary judgment; it then assigned the case to a magistrate judge, who issued a report and recommendation. The district court adopted the magistrate judge's report and recommendation and granted summary judgment for the County. First Assembly then perfected this appeal.

## III. *STANDARD OF REVIEW*

A district court's grant of summary judgment is an issue of law to be reviewed de novo. *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1459 (11th Cir.1992). "The "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Wouters v. Martin County, Fla.*, 9 F.3d 924, 928 (11th Cir.1993), quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986). Summary judgment is appropriate if no genuine issue of material fact exists, and if the moving party is entitled to judgment as a matter of law. *Id.*

## IV. *DISCUSSION*

### A. *Procedural Due Process*

First Assembly contends that it was denied procedural due process in the enactment of the zoning laws and in the County's failure to codify those laws

annually as required under Florida law. [1] s 125.66 Fla.Stat.; [2] s 125.68 Fla.Stat. [3] First Assembly's

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[1] First Assembly argues at the outset that because the procedure required by state law for the enactment of the zoning laws was not strictly followed, the ordinances are in fact void. Then, in its Reply Brief, it retreats from this argument, stating that it merely asserted the invalidity argument in order to illustrate the importance of the strict enactment procedures. Were First Assembly actually challenging the legitimacy of the zoning ordinances it might prevail, because it does appear that the enactment procedures were not strictly followed. However, this is not First Assembly's contention. Rather, First Assembly argues that the ordinances as enacted, and the failure of the County to annually codify the ordinances, constitutes a denial of federal due process under the law.

[2] Section 125.66 Fla.Stat. provides in pertinent part:

(1) In exercising the ordinance-making powers conferred by ... the State Constitution, counties shall adhere to the procedures prescribed herein.

* * * * * * * * *

(5)(b) In cases in which the proposed rezoning involves 5 percent or more of the total land area of the county, the board of county commissioners shall provide for public notice and hearings as follows:

(1) The board of county commissioners shall hold two advertised public hearings on the proposed ordinance or resolution. Both hearings shall be held after 5 p.m. on a weekday, and the first shall be held approximately 7 days after the day that the first advertisement is published. The second hearing shall be held approximately 2 weeks after the first hearing and shall be advertised approximately 5 days prior to the public hearing. The day, time, and place at which the second public hearing will be held shall be announced at the first public hearing.

(2) The required advertisements shall be no less than one-quarter page in a standard size or a tabloid size newspaper, and the headline

argument is not persuasive; while the County's actions may constitute violations of state law, it does not follow that such violations implicate the federal Constitution.

Construing the facts in the light most favorable to the non-movant, one can assume that the County did not follow proper procedures both in passing the ordinances and in subsequently failing to codify them. Thus, the central focus of our inquiry must be whether such a procedural failure rises to the level of a federal constitutional violation. The district court discussed this precise issue in its order denying the motion for a preliminary injunction. *First Assembly of God v. Collier County*, 775 F. Supp. 383, 388 (M.D.Fla.1991) (Hodges, J.). The district court's analysis in that opinion is sound, and is accordingly adopted by this court. The district court first noted that in order to demonstrate a violation of procedural due process, First Assembly must show:
(1) that it has a liberty or property interest that was interfered with by the state; and (2) that the state failed to use "constitutionally sufficient procedures" in interfering with that interest. *Id.*

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in the advertisement shall be in a type no smaller than 18 point. The advertisement shall not be placed in that portion of the newspaper where legal notices and classified advertisements appear....

3/ Section 125.68 Fla.Stat. provides in pertinent part:

(1) Counties shall maintain a current codification of all ordinances. Such codification shall be published annually by the board of county commissioners.

Whether First Assembly has a protectable property interest is a matter of state law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed. 2d 494 (1985). Under Florida law, procedural due process attaches to zoning actions which alter the manner in which a property owner can use his or her land. *First Assembly*, 775 F. Supp. at 389; *Gulf & Eastern Development Corporation v. City of Fort Lauderdale*, 354 So. 2d 57, 59 (Fla. 1978). Thus, First Assembly has met the first prong of the procedural due process analysis.

However, it is in the second prong of the analysis where First Assembly comes up short:

> What [First Assembly has] not made clear, however, is that the process afforded them in the enactment of the challenged zoning ordinances was *insufficient under the federal Constitution*. [First Assembly] argues only that the procedure used in enacting the zoning ordinances violated state law.

*First Assembly*, 775 F. Supp. at 389 (emphasis added). Significantly, the violation of a state statute mandating procedure is not the equivalent of a federal Constitutional violation.

> Even if the notice in this case is insufficient to satisfy the state statute, the state statute does not define the process due under the federal Constitution. Therefore, even if the state statute has been violated, that does not prove a violation of a federal constitutional right. ... We emphasize that the violation of

> a state statute outlining procedure does not necessarily equate to a due process violation under the federal Constitution. If otherwise, federal courts would have the task of insuring strict compliance with state procedural regulations and statutes.

*Harris v. Birmingham Board of Education*, 817 F.2d 1525, 1527-1528 (11th Cir.1987) (citation omitted). Thus, First Assembly must show a federal constitutional violation in order to survive summary judgment.

Due process requires that persons deprived of a right must be afforded notice and an opportunity to be heard. *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 984, 108 L.Ed. 2d 100 (1990); *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed. 2d 725 (1975) (At a minimum, due process requires "*some* kind of notice and ... some kind of hearing." (emphasis in original)). Here, First Assembly does not dispute that some notice was given, nor does it dispute that a public hearing was held. Rather, First Assembly argues that the fact that the published notice was less than 1/4 page in size, did not include a geographic location map, and did not have a headline in 18 point type proves that it was denied sufficient notice under the Constitution. Given that First Assembly was provided notice and an opportunity to be heard, we hold that the deficiencies in notice alleged in this case do not rise to the level of a federal constitutional violation. Therefore, because First Assembly cannot show a violation of procedural due process, the district court was correct in entering summary judgment for the County

on this issue.

B. *Free Exercise Clause*

First Assembly contends that the enforcement of Naples' zoning ordinances violates the Free Exercise Clause of the First Amendment because it prevents the church from practicing its religion. First Assembly claims that sheltering the homeless is an essential aspect of the Christian religion; thus, the forced closing of the homeless shelter interferes with First Assembly's free exercise of religion.

The most recent Supreme Court case interpreting the Free Exercise Clause is *Church of the Lukumi Babalu Aye v. City of Hialeah*, ___U.S.___, 113 S.Ct. 2217, 124 L.Ed. 2d 472 (1993). In that case, the Court held that a local law targeting the use of animal sacrifice for religious purposes violated the Free Exercise Clause. In so holding, the Court reversed this court which had affirmed the district court's upholding of the local ordinance. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 723 F. Supp. 1467 (S.D.Fla.1989), *aff'd*, 936 F.2d 586 (11th Cir.1991).

The Supreme Court explained that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.*, ___ U.S. at ___, 113 S.Ct. at 2226. A law that does not meet these requirements, however, must be justified by a compelling state interest and must be narrowly tailored to meet that interest. *Id.* Thus, the

threshold questions in analyzing a law challenged under the Free Exercise Clause are (1) is the law neutral, and (2) is the law of general applicability?

The Court applied these requirements in *Hialeah*, and determined that the ordinances, which were enacted only when the community realized that the Santerians were planning to build a church in their community, and which explicitly targeted the religious conduct of animal sacrifice, were not neutral. In addition, the Court found that the laws were not of general applicability, but rather applied "only against conduct motivated by religious belief." *Id.*, U.S. at ___, 113 S.Ct. at 2233. Therefore, the ordinance at issue in *Hialeah* had to endure strict scrutiny--an obstacle it could not overcome.

First Assembly relies on *Hialeah*, in the mistaken belief that the present case is analogous. Clearly, the present case is distinguishable from *Hialeah*. Even if it is assumed for the sake of argument that sheltering the homeless is a central, essential element of the Christian religion, the fact still remains that the Naples ordinances are neutral and of general applicability. The first zoning ordinance, 82-2, simply does not implicate the Free Exercise Clause. This ordinance, as passed, zones an entire residential area and makes a special exception for churches. It is neutral on its face and is of general applicability. Thus, it is only the second ordinance, 91-34, which is really in question here.

Ordinance 91-34 was passed subsequent to the opening of the shelter, amid much consternation over the

problem of the homeless in the Naples community. This ordinance identifies a homeless shelter as a group home and provides regulations for its operation. The ordinance is also facially neutral--it applies to any homeless shelter, regardless of who operates it. More importantly, Naples has not prohibited the operation of homeless shelters. On the contrary, it has defined areas in which the shelters may operate and provided regulations for such. These regulations apply to all group homes, once again regardless of their ownership or affiliation, and were motivated by wholly secular concerns. The intent of the ordinance was not to inhibit or oppress any religion; rather, the Commission was motivated to address a general problem of health and safety concerns. The fact that First Assembly was affected was incidental. Thus, this ordinance is of general applicability.

Another case which aids our analysis is this court's decision in *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729 (11th Cir.1983), *cert. denied*, 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed. 2d 52 (1984).[4/] *Grosz* is particularly helpful

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[4/] First Assembly argues that *Grosz* can no longer be considered good law because the district court relied on *Grosz* in deciding *Hialeah* and was reversed. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D.Fla.1989), *aff'd*, 936 F.2d 586 (11th Cir.1991), *reversed*, ___ U.S. ___, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). We disagree. The Supreme Court reversed the application of *Grosz*, not the holding of *Grosz* itself or the reasoning behind it. Therefore, the *Grosz* case, correctly applied, still has precedential value in this circuit. Regardless, whether this court relies on *Grosz*, or relies exclusively on *Hialeah*, the result is the same: no Free Exercise Clause violation exists in this case.

in this case because it is so closely analogous. The plaintiff in *Grosz* was a Jewish Rabbi who began conducting orthodox worship services at his home. His religion required that at least ten adult males be present at the ceremony. Word spread of the services, and sometimes as many as fifty people would worship in his remodeled garage. *Id.* at 731-732. Unfortunately, these services were in violation of Miami Beach zoning ordinances. Following complaints from neighbors, the city notified Grosz that he was in violation of the zoning laws. *Id.*

In deciding that the zoning laws did not violate Grosz's right to free exercise of religion, this court established a three part test. First, the government regulation must regulate religious conduct, not belief. Second, the law must have a secular purpose and a secular effect. Third, once these two thresholds are crossed, the court engages in a balancing of competing governmental and religious interests. 721 F.2d at 733. In *Grosz*, as in the instant case, the two thresholds are easily met. The focus is thus on the balancing of interests.

In balancing those interests in *Grosz*, this court explained:

> On the free exercise side of the balance weighs the burden that Appellees bear of conducting their services in compliance with applicable zoning restrictions or relocating in a suitably zoned district. Countering on the government's side is the substantial infringement of the City's zoning policy that would occur were the conduct allowed to

> continue.... [T]he relative weights of the burdens favor the government.

*Id.* at 741. The same could be said for the present case. The burden on First Assembly to either conform its shelter to the zoning laws, or to move the shelter to an appropriately zoned area, is less than the burden on the County were it to be forced to allow the zoning violation. Thus, under the *Grosz* test, First Assembly's right to free exercise of religion is not violated by the County's zoning ordinances.

The Naples ordinances pass the threshold tests under the Supreme Court's Free Exercise Clause analysis, as well as this court's test as articulated in the *Grosz* case. Thus, the district court did not err in granting summary judgment in favor of the County on this issue.

## V. *CONCLUSION*

The district court did not err in granting summary judgment in favor of the County. The breach of state procedure did not rise to the level of a federal due process violation, and the imposition of the zoning laws did not violate First Assembly's rights under the Free Exercise Clause of the First Amendment.

AFFIRMED.

FIRST ASSEMBLY OF GOD OF NAPLES, FLORIDA, INC.,
Plaintiff-Appellant, Deborah Lynn Cook, John Michael Webber, Toby Westfall, etc., Brian Knies, etc., David Reed, etc., et al., Plaintiffs, v.
COLLIER COUNTY, FLORIDA, Don Hunter, as Sheriff of Collier County, Florida,
Defendants-Appellees.

FIRST ASSEMBLY OF GOD OF NAPLES, FLORIDA, INC.
v. COLLIER CTY.

No. 93-2399
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

27 F.3d 526; 1994 U.S. App. LEXIS 20322;
8 Fla. Law W. Fed. C 457
August 3, 1994, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of Florida (No. 91-211-CIV-FTM-23), Sherman G. Finesilver, Judge, Sitting by Designation.

Original Opinion of May 5, 1994, Reported at: 1994 U.S. App. LEXIS 9901. 20 F.3d 419.

COUNSEL: For APPELLANTS: Mark R. Dolan, Largo, FL.
For APPELLEES: Maynard W. Schryver, Naples, Fl. For Collier County: Gregory W. Hootman, Sarasota, Florida. M. W. Schryver, Naples, FL. Cindy R. Galen, Elinor E. Erben, Sarasota, FL.

JUDGES: Before COX and DUBINA, Circuit Judges, and CLARK, Senior Circuit Judge.
OPINION BY: PER CURIAM

OPINION: PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

PER CURIAM:

The petition for rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

However, our previous opinion reported at 20 F.3d 419 (11th Cir. 1994), is hereby modified to add the following footnote to the last word on page 424:

[5] We observe that the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. §§ 2000bb to 2000bb-4, may apply to this case. However, since it was not raised by either party, we decline to discuss it.

In all other respects, our previous opinion remains in full force and effect.

FIRST ASSEMBLY OF GOD
OF NAPLES, FLORIDA, INC., et al.,
Plaintiffs, v. COLLIER COUNTY, etc., et al.,
Defendants

FIRST ASSEMBLY OF GOD
OF NAPLES v. COLLIER CTY.

CASE NO. 91-211 CIV-FtM-10(D)

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA,
FORT MYERS DIVISION
775 F. Supp. 383; 1991 U.S. Dist. LEXIS 18878

October 4, 1991, Decided

JUDGES:

William Terrell Hodges, United States District Judge.

OPINION BY: HODGES

OPINION: ORDER

WILLIAM TERRELL HODGES, UNITED STATES DISTRICT JUDGE

This is an action for declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201,

brought by a church and residents of a homeless shelter at the church against Collier County, Florida and the Sheriff of Collier County. The Defendants have charged the church-operated homeless shelter with violations of several county zoning regulations and have ordered the church to close the shelter. Plaintiffs allege that the zoning regulations were enacted in contravention of state law and that their Constitutional right to procedural due process was violated. Plaintiffs also allege that the Defendants' actions have violated the church's First Amendment right to free exercise of religion.

Plaintiffs' previous motions for a temporary restraining order and for a preliminary injunction were denied by Order entered August 15, 1991. Plaintiffs renewed their motion for a preliminary injunction and a hearing was conducted on the motion on September 19, 1991. Having considered the parties' briefs and their oral argument, the Court finds that the requested preliminary injunction should not issue because the Plaintiffs have failed to demonstrate a substantial likelihood of ultimate success on the merits of their claims.

*Background*

Plaintiff First Assembly of God of Naples, Florida, Inc. ("First Assembly") operates a homeless shelter on the grounds of its church. The church is located on a six acre parcel of land in Collier County, Florida in an area which is zoned RMF-6, for multi-family residential use. On November 15, 1983 First Assembly was granted a

provisional use permit by the Collier County Board of Zoning Appeals to operate a church on the property. Collier County Zoning Ordinance 82-2, in effect at that time, defined a church as "a building used as a place of worship and religious education, and for customary accessory uses, by a body or organization of religious believers."

In November, 1990, First Assembly opened a shelter for the homeless on its property. The shelter was located in a building that had previously been used as a clubhouse and a day care center. [1/] The complaint states that the shelter has, at times, housed a maximum of twenty eight people.

In April, 1991, a county official charged that maintenance of the shelter constituted a zoning violation. The county Code Enforcement Board ("CEB") held five hearings on the matter and issued a written determination on August 12, 1991 that First Assembly was in violation of several zoning ordinances. The CEB found that the shelter was not a "customary accessory use" of the church property and that the applicable zoning and housing codes did not permit the premises to be used for housing the number of people residing at the shelter. The CEB further found that First Assembly had not applied for a

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[1/] First Assembly was initially charged with violation of the county building code for failing to obtain the necessary permits prior to renovation of the structure, and Plaintiffs challenged the validity of that code in their complaint. Counsel for the Plaintiffs stated at the hearing that the building code dispute has been resolved.

provisional use permit to maintain a homeless shelter c its premises. First Assembly was required to correct th violations by closing the shelter within three days or pa a fine of over $ 250 per day that the shelter remaine open thereafter.

The shelter has now been closed. Plaintiffs asse that the mortgage holder on the church proper threatened to foreclose on the mortgage if a lien wa placed on the property by the county to recover any fin levied by the CEB. Plaintiffs' motion requests the Court enjoin the Defendants from enforcement of the zoni ordinances.

*Preliminary Injunction Standard*

A movant for a temporary restraining order preliminary injunction must show:

> (1) a substantial likelihood that he will eventually prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.

*Zardui-Quintana v. Richard*, 768 F.2d 1213, 12 (11th Cir. 1985) (citation omitted). Moreover, "t preliminary injunction is an extraordinary and dras remedy not to be granted unless the movant 'clea carries the burden of persuasion' as to the fo

prerequisites." *Zardui-Quintana*, at 1216.

Plaintiffs have alleged two distinct theories of relief: (1) that the zoning ordinances violate the Plaintiffs' First Amendment right to free exercise of religion, and (2) that the zoning ordinances are void as violative of the Plaintiffs' Fourteenth Amendment right to procedural due process. Although these theories are entirely separate from one another, the parties have frequently blurred the distinction between them in their briefs and oral argument. [2/] Each theory will be discussed separately.

*Free Exercise of Religion*

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The First Amendment applies to state and local governments through the due process clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). However, it is "clear that a state may by general and non-discriminatory legislation . . . safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the [First and] Fourteenth Amendments." *Id.* 310 U.S.

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[2/] It should also be observed that the Plaintiffs do not occupy precisely the same posture with respect to these constitutional claims; and, as between them, the church itself would seem to have the strongest position. The analysis that follows, therefore, focuses primarily upon the position of the church.

at 304, 60 S.Ct. at 903. It is the balancing of these two competing interests which the Court must undertake in this case should the Plaintiffs pursue this claim to a final determination. The Court is aided in this task by an Eleventh Circuit decision which contains an exhaustive review of Supreme Court case law on the subject and provides the rule of decision in this case. *Grosz v. Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed. 2d 52 (1984).

The plaintiff in *Grosz*, Rabbi Naftali Grosz, was the elderly leader of an orthodox Jewish sect who wished to conduct religious services at his home. The plaintiff's religion required the presence of at least ten adult males in order to conduct prayer services. Initially the plaintiff conducted services in his home, but he later moved the services to a detached garage on his premises which he remodeled into a small synagogue with seats for 30 people and all of the necessary accoutrements for holding prayer services. As word spread of the new synagogue, visitors from out of town began using the facility for worship, sometimes asking residents for directions to the "Grosz shul (synagogue)." During the winter months, as many as 50 people would sometimes attend services at the Grosz home. *Id.* at 731-732.

Miami Beach zoning ordinances prohibited the establishment of churches or synagogues in single family residential zones, where the Grosz home was situated. The plaintiffs in *Grosz* were specifically notified by the city when they received a building permit for remodeling the

garage that the structure could not be used as a religious institution. Numerous other residential zones in the city, constituting at least 50% of the entire city territory, specifically permitted property within those zones to be used for houses of worship. One such zone was within four blocks of the Grosz residence. Following complaints from neighbors, the city of Miami Beach notified Grosz that the synagogue was a violation of the zoning ordinances and threatened him with prosecution for a misdemeanor offense. *Id.*

The Court in *Grosz* established a three part test to be applied when a statute is challenged as violative of the free exercise clause. The statute or ordinance must pass two threshold tests and then a balancing test is conducted in which the government's interest is weighed against the religious interest. *Id.* at 733.

The first threshold test requires an examination of the challenged government action to determine whether it regulates religious beliefs and opinions or whether it regulates religious conduct. *Id.* The government may not restrict the freedom to hold religious beliefs or opinions, for that freedom is absolute. *Braunfeld v. Brown*, 366 U.S. 599, 603, 81 S.Ct. 1144, 1146, 6 L.Ed. 2d 563 (1961). If the regulation restricts religious conduct it passes this first test because, "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." *Id.*

The second threshold test requires that the challenged government action have both a secular purpose

and a secular effect. That is, the action may not be based upon disagreement with religious tenets or practices, or be aimed at impeding religion. Further, the regulation may not have as its "essential effect" a negative influence on the pursuit of religious activity or the expression of religious belief. *Grosz*, at 733.

The *Grosz* court quickly satisfied the two threshold inquiries and the same may be done here. Because the zoning ordinance as applied in this case regulates housing the homeless on church property, not one's belief in doing so, it involves conduct. Further, as stated in *Grosz*, zoning ordinances of general application are not aimed at impeding religion and, "given zoning's historical function in protecting public health and welfare, and the incidental nature of the asserted burden on religion, the essential effect of zoning laws is clearly secular." *Id.* at 738, citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed. 2d 797 (1974). Plaintiffs state in a conclusory fashion that the zoning ordinance does not pass the threshold tests. Plaintiffs offer no factual basis or legal argument to support this assertion and the Court can find none.

The *Grosz* balancing test compares the burden on the government (of altering its activity) with the burden on religion by requiring Plaintiffs' compliance with the challenged ordinance. *Grosz*, at 734. The balancing test is more amorphous than the threshold inquiries. The *Grosz* court was guided by the principles espoused in several Supreme Court decisions, but none laid down

specific guidelines for dealing with the particular situation presented in *Grosz*. *Id.* Fortunately, the facts in *Grosz* are sufficiently similar to this case that the Court may derive more specific guidance from the teachings of *Grosz*.

In *Grosz*, the court held that preservation of government's ability to regulate zoning is "a significant governmental objective." *Id.* at 738. The Defendants argue in their moving papers that the issuance of the requested injunction would preclude the county from enforcing its zoning, building and housing codes, thus presenting the identical significant governmental objective. *Grosz* also held, however, that the court must consider the impact of a religious based exception to the zoning ordinance. *Id.* It found that "granting an exception would defeat City zoning policy in all neighborhoods where that exception was asserted." *Id.*

The zoning interest at issue in *Grosz* involved the crowds generated in the residential neighborhood by the existence of a place of worship. Here, the issue is the number of persons housed in the shelter. The shelter apparently provides more than temporary protection from the elements on a night-by-night basis; rather, homeless persons who are served by the facility are called "residents" by the church in its rules for the shelter and in its moving papers. One of the individual Plaintiffs alleges that he is irreparably harmed by the closing of the shelter because he needs to have a "permanent residence" address to supply to his parole officer. Residents of the shelter are permitted to leave their belongings at the shelter

during the day. They pay a fee of $ 3 per night and the duration of their stay at the facility is not limited.

When asked at the hearing how the shelter differed from a rooming house or apartment house, counsel for the Plaintiffs was unable to articulate a meaningful distinction. The imposition of a religious based exception, therefore, would effectively prevent the county from enforcement of the zoning code. The county would have to permit any rooming house or apartment-like, non-conforming use of property if a religious interest was asserted. The *Grosz* court concluded, as must be concluded here, that: "Together, the important objectives underlying zoning and the degree of infringement of those objectives caused by allowing the religious conduct to continue place a heavy weight on the government's side of the balancing scale." *Grosz* at 739.

In *Grosz*, the court also weighed the zoning restriction's burden on religion by examining the importance of the prohibited activity to the practice of the particular religion. After hearing evidence presented by the plaintiffs, the *Grosz* court determined that, because the plaintiffs' religion required the presence of ten adult males and the city's complaints were based upon the congregation of significantly larger groups, the prohibited activity was "nonessential." *Id.* Further, the court held that because the city only limited the activity in geographic terms and many other suitable locations existed nearby, the burden imposed on religion was less weighty than the burden on government. *Id.*

Plaintiffs have provided little indication of the significance to their religion of the practice of housing the homeless. Their moving papers state:

> Plaintiff Church maintains that The Shelter is a ministry of the Church. The tenets of the faith of the First Assembly mandate that the church practice acts of benevolence. The shelter is operated as an integral part of the church.

Defendants point out that First Assembly operated the church for eight years but did not open the shelter until November, 1990, suggesting that it is not an essential part of Plaintiffs' religious practices. Defendants also note that church operated homeless shelters exist throughout the county in areas that are zoned differently. Presumably, Plaintiffs would be permitted to operate a shelter in those areas. Also, Plaintiffs' state their religious tenets generally as including acts of benevolence, but they note no specific requirement of having a homeless shelter on the grounds of their church.

Even so, the Court does not presume to make a determination as to the religious significance to the Plaintiffs of maintaining the shelter. It is enough to observe as stated in *Grosz*, "The burden imposed, though, does not rise to the level of criminal liability, loss of livelihood, or denial of a basic income sustaining public welfare benefit. In comparison to the religious infringements analyzed in previous free exercise cases the burden here stands towards the lower end of the spectrum." *Grosz*, at 739.

It is also noteworthy that this case differs from the facts in *Grosz*, to Plaintiffs' disadvantage, because the religious practice regulated by the government here is somewhat removed from the central religious activity of prayer. A claim such as the one brought by Plaintiffs was anticipated in a recent law review article:

> One area in which the regulation of religious action has occurred involves uses not devoted directly to prayer. Most frequently, this type of regulation involves the operation of a church as a religious school or the use of a church for some type of communal living. These situations often involve the free exercise clause because churches claim that such uses are an integral part of their operations or, indeed, of their beliefs. However, because these uses are frequently further from the direct idea of religious expression, courts are more likely to uphold reasonable regulation. This is in the context, of course, of Supreme Court decisions allowing persons with religious beliefs to define what constitutes their religion. Nonetheless, when such beliefs are expressed as action, the courts are more willing to subject such activities to time, place and manner regulations.

Kenneth Pearlman, *Zoning and the Location of Religious Establishments*, 31 Cath. Law. 314, n. 119 and accompanying text (1988).

The only decision within the Eleventh Circuit in which a zoning ordinance was invalidated under the free

exercise clause is easily distinguished from this case. *Church of Jesus Christ of Latter-Day Saints v. Jefferson County*, 741 F. Supp. 1522 (N.D.Ala. 1990). In *Jefferson*, a church purchased a twelve acre parcel of land in a residential community and sought a rezoning to permit the church to move its facilities there. The Church's request was denied because of neighborhood opposition, and there was no other suitably zoned land available within the jurisdiction. Applying the *Grosz* test, Judge Propst held that because there was no other suitable land available and because the rezoning process was subject to neighborhood whim, the burden imposed upon religion outweighed the cost to government of non-compliance with the ordinance. *Id.*

There are significant differences between *Jefferson* and this case. Most importantly, as in *Grosz*, there is a substantial amount of land within the county where Plaintiffs could operate a homeless shelter in compliance with zoning regulations. Also, there is no indication that the Collier County zoning enforcement procedures are based upon subjective considerations or neighborhood pressure.

*Procedural Due Process*

Plaintiffs allege that the comprehensive zoning ordinances which established the zoning regulations and housing code for Collier County were not enacted in compliance with state law and therefore violated their right to procedural due process as guaranteed by the

Fourteenth Amendment. Plaintiffs do not allege that the decision of the CEB requiring them to close the shelter failed to accord procedural due process to them.

Zoning Ordinance 82-2, enacted in 1982, established zoning regulations for all unincorporated areas in the county. This ordinance defined a church as a place of worship including all "customary and accessory uses." The CEB found that Plaintiffs' homeless shelter was not a customary and accessory use for a church. Plaintiffs allege that in enacting Ordinance 82-2 the county did not comply with several of the technical requirements of Fla. Stat. § 125.66. Plaintiffs claim that the published notice of the hearing on the ordinance was less than 1/4 page in size, did not include a geographic location map and did not have a headline in 18 point type. Plaintiffs do not assert that the ordinance was enacted without any notice or hearing.

Zoning Ordinance 89-06, enacted in 1989, established a housing code for unincorporated Collier County and designated a housing official to oversee enforcement of that code. Plaintiffs allege infirmities in the enactment of Ordinance 89-06 similar to those alleged with respect to Ordinance 82-2. Plaintiffs also allege that the county violated Fla. Stat. § 125.68 by failing to codify any of their ordinances.

To establish a procedural due process violation, Plaintiffs must show, first, that they had a liberty or property interest which was interfered with by the state, and second, that the state failed to use constitutionally

sufficient procedures in depriving Plaintiffs of that right. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904, 1908, 104 L.Ed. 2d 506 (1989). Plaintiffs correctly argue that the initial determination of whether they have a protectable property interest is governed by state law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed. 2d 494 (1985). However, the constitutionality of the procedures used by the state in depriving the Plaintiffs of a protected right does not turn on the procedures mandated by state law:

> Even if the notice in this case is insufficient to satisfy the state statute, the state statute does not define the process due under the federal Constitution. Therefore, even if the state statute has been violated, that does not prove a violation of a federal constitutional right. [Plaintiffs] must show not just a violation of a state statute, but a constitutional violation in this section 1983 action. . . . We emphasize that the violation of a state statute outlining procedure does not necessarily equate to a due process violation under the federal constitution. If otherwise, federal courts would have the task of insuring strict compliance with state procedural regulations and statutes.

*Harris v. Birmingham Board of Education*, 817 F.2d 1525, 1527-1528 (11th Cir. 1987).

It is clear under Florida law that an action by a zoning authority which alters the manner in which a

property owner may use its land is a protected property interest to which procedural due process attaches. See *Gulf & Eastern Development Corporation v. Fort Lauderdale*, 354 So. 2d 57, 59 (Fla. 1978). What Plaintiffs have not made clear, however, is that the process afforded them in the enactment of the challenged zoning ordinances was insufficient under the federal Constitution. Plaintiffs argue only that the procedure used in enacting the zoning ordinances violated state law.

At a minimum, the due process clause requires that persons deprived of life, liberty or property be afforded notice and an opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545, 549, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965). Plaintiffs admit that an advertised public hearing was held prior to the enactment of the zoning ordinances. Therefore, they were afforded notice and an opportunity to be heard. That this notice did not comply with state law requirements is not constitutionally significant. *See Harris*, at 1527. Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their procedural due process claim.

*State Law Claims*

Plaintiffs' only remaining claims are that the zoning ordinances are void for failure to comply with Florida Statutes §§ 125.66 and 125.68. That issue is beyond the subject matter jurisdiction of this Court absent the exercise of pendant jurisdiction. 28 U.S.C. §§ 1331 and 1332. The decision to exercise pendant jurisdiction over

a claim is within the discretion of the Court, but "such needless decisions of state law are to be avoided." *Grant v. County of Seminole*, 817 F.2d 731, 732 (11th Cir. 1987), citing *Moor v. County of Alameda*, 411 U.S. 693, 715-717, 93 S.Ct. 1785, 1799, 36 L.Ed. 2d 596 (1973) and *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed. 2d 218 (1966). Plaintiffs' state law claims are, therefore, due to be dismissed for lack of subject matter jurisdiction and, if Plaintiffs wish to pursue prosecution of those claims, they should be directed to the state courts.

Accordingly, upon due consideration, it is ORDERED that:

(1) Plaintiffs' motion for a preliminary injunction (Doc. #11) is DENIED;

(2) All claims in the complaint seeking to declare the zoning ordinances null and void for violation of state law are hereby DISMISSED without prejudice for lack of subject matter jurisdiction;

(3) The Court notes that the Defendants have moved to dismiss the complaint; and, given the reasons stated and the result reached in this order, it appears that summary judgment in favor of the Defendants with respect to Plaintiffs' federal constitutional claims may be appropriate. *See* Rule 12(b), F. R. Civ. P. Accordingly, the parties are directed to show cause by written response filed within fifteen (15) days from the date of this order why summary judgment should not be entered.

Any response opposing summary judgment should

specifically identify in numbered, single sentence paragraphs, those material issues of fact or law which remain unresolved and which preclude such disposition of the case.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 4th day of October, 1991.

Wm. Terrell Hodges, UNITED STATES DISTRICT JUDGE

D-1

**IN THE UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**FORT MYERS DIVISION**

Case No. 91-211-CIV-FTM-323 (D)

FIRST ASSEMBLY OF GOD OF NAPLES, FLORIDA, INC.; DEBORAH LYNN COOK; JOHN MICHAEL WEBBER; and TOBY & RUBY WESTFALL, BRIAN KNIES, DAVID REED, ELIZABETH JARRETT, JOHN FOUS, and JAMES MARTIN, as representatives of THAT CERTAIN CLASS OF INDIVIDUALS PRESENTLY AND IN THE FUTURE SHELTERED AT THE FIRST ASSEMBLY OF GOD CHURCH,

Plaintiffs,

v.

COLLIER COUNTY, FLORIDA and DON HUNTER AS SHERIFF OF COLLIER COUNTY, FLORIDA,

Defendants.

## ORDER REGARDING MOTION FOR SUMMARY JUDGMENT

This is an action for declaratory relief brought by a church and residents of the church's homeless shelter. Jurisdiction is based on 28 U.S.C.A. ss 1331 and 1343 (West Supp. 1992) and 28 U.S.C.A. s 2201 (West Supp. 1992). This matter comes before the Court on a Recommendation of United States Magistrate Judge filed October 8, 1992. The Court has reviewed Plaintiffs' objections, and for the reasons set forth below, the Court adopts the Magistrate Judge's recommendation and dismisses Plaintiffs' Complaint.

### I. BACKGROUND

Plaintiff First Assembly of God of Naples, Florida, Inc. (First Assembly) operates a homeless shelter on the grounds of its church. The church is located on a six acre parcel of land in Collier County, Florida in an area which it zoned RMF-6, for multifamily residential use. On November 15, 1983 First Assembly was granted a provisional use permit by the Collier County Board of Zoning Appeals to operate a church on the property. Collier County Zoning Ordinance 82-2, in effect at that time, defined a church as "a building used as a place of worship and religious education, and for customary accessory uses, by a body or organization of religious believers."

In November, 1990, First Assembly opened a

shelter for the homeless on its property. The shelter was located in a building that had previously been used as a clubhouse and a day care center. The complaint states that the shelter has, at times, housed a maximum of twenty-eight people.

In April, 1991, a county official charged that maintenance of the shelter constituted a zoning violation. The County Code Enforcement Board (CEB) held five hearings on the matter and issued a written determination on August 12, 1991 that First Assembly was in violation of several zoning ordinances. The CEB found that the shelter was not a "customary accessory use" of the church property and that the applicable zoning and housing codes did not permit the premises to be used for housing the number of people residing at the shelter. The CEB further found that First Assembly had not applied for a provisional use permit to maintain a homeless shelter on its premises. First Assembly was required to correct the violations by closing the shelter within three days or pay a fine of over $250 per day that the shelter remained open thereafter.

The shelter has now been closed. Plaintiffs assert that the mortgage holder on the church property threatened to foreclose on the mortgage if a lien was placed on the property by the county to recover any fines levied by the CEB. The defendants request that the Verified Complaint be dismissed for failure to state a cause of action upon which relief may be granted. The Court, by Order entered October 4, 1991, has determined

that Defendants' Motions to Dismiss shall be treated as motions for summary judgment.

## II. STANDARD FOR SUMMARY JUDGMENT

Granting summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Only disputes over facts which may affect the outcome of the case will properly preclude entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists where no reasonable jury could find for the nonmovant on the basis of the evidence presented. *Id.* A motion for summary judgment is decided based on "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 323.

Summary judgment may not properly be granted unless the moving party has first met its burden of establishing that there is no genuine issue of material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The initial burden on a motion for summary judgment is always on the movant irrespective of which party may ultimately have the burden of proof at trial. *Id.* The district court should expressly determine whether the moving party has satisfied this burden. *Clark*, 929 F.2d at 609.

When the nonmoving party has the ultimate burden

at trial, the moving party may satisfy its initial burden of proof in two ways. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991). First, the moving party may show "that there is an absence of evidence to support the nonmoving party's case" without identifying supporting materials. *Id.* (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986)). Alternatively, the moving party may identify portions of the record or submit affidavits or other appropriate evidence which establishes that the nonmoving party will be unable to prove its claims at trial. *Id.* at 1437-38 (*citing Celotex*, 477 U.S. at 323-24).

Only after the movant has met its initial burden does the burden of proof shift to the nonmovant. *Clark*, 929 F.2d at 608. The nonmovant must then establish that there are issues of material fact to be determined at trial. *Celotex*, 477 U.S. at 324; *Clark*, 929 F.2d at 608. In doing so, the nonmovant may not rely merely on its pleading. FED. R. CIV. P. 56 (e). Instead, the nonmovant's response "must set forth specific facts showing that there is a genuine issue for trial." *Id.*

## III. ANALYSIS

### A. Defendant Hunter (Sheriff of Collier County)

Defendant Hunter's Motion for Summary Judgment is based on his claim that he is an improper party to this suit. The Magistrate Judge recommended that Defendant Hunter's motion be granted because Plaintiffs have failed to establish a case or controversy against the Sheriff. The

Magistrate Judge cited the following authority:

> Plaintiffs in the federal courts must have a "personal stake in the outcome" of the case, *Baker v. Carr*, 369 U.S. 186, 204, (1962), and "must allege some threatened or actual injury resulting from the putatively illegal action." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973),. "Abstract injury is not enough . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).' *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 984 (11th Cir. 1990).

Here, Plaintiffs have failed to allege that Defendan Hunter has done anything that would meet the minimun case and controversy requirements required by law Defendant Hunter's connection to this case is remote a best. There are no allegations that Defendant Hunte caused any injury or presented any real and immediat threat of injury. Plaintiffs object to the Magistrate Judge' recommendation on the basis of two decisions[1/] issued b the United States District Court for the District o Connecticut in which that court interpreted the Federa Rules of Civil Procedure to require that where declarator and injunctive relief is sought, the state officer charge with enforcement should be joined. However, Plaintiff

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[1/] *Bogan v. New London Housing Authority*, 366 F.Supp. 861 (D.Conn. 1973); *Cafano v. Cimmino*, 501 F.Supp. 397 (D.Conn. 1980), *aff'd*, 636 F.2d 1200 (2nd Cir. 1980).

cited case, *Cafano*, requires that a case or controversy exist as a precedent to any analysis of whether a party is properly joined for purposes of declaratory relief. *See Cafano*, 501 F.Supp. at 399. Furthermore, Plaintiffs' interpretation of joinder has not been accepted by any courts in this jurisdiction. Thus, the Court is compelled to adopt the Magistrate Judge's analysis which is founded on firmly established case and controversy principles.

Defendant Hunter seeks costs and attorneys fees under FED.R.CIV.P. 11, asserting that Plaintiffs action against him was frivolous and meritless. The Magistrate Judge concluded that Plaintiffs' joining of Defendant Hunter did "not rise to the level of a frivolous claim." (Mag. Rec. at 15.) The Court agrees with the Magistrate Judge on the grounds that Plaintiffs asserted an array of facts which they reasonably argued created a case or controversy between themselves and Defendant Hunter. The fact that the Court does not accept the argument does not render Plaintiffs' claim frivolous. Furthermore, the Court believes Plaintiffs' joinder of Defendant Hunter was based on a good faith, albeit weak, argument for the extension of law in this jurisdiction.

**B. Defendant Collier County**

The specific allegations in the Complaint directed to Defendant Collier County can be categorized, for the purpose of analysis, into two categories: "Free Exercise of Religion" and "Procedural Due Process."

**1. "Free Exercise of Religion"**

The Court, in its October 4, 1991 Order, thoroughly discussed Plaintiffs' Free Exercise of Religion claim. The Magistrate Judge has accurately reflected the Court's position on this issue, namely, that application of the balancing test set forth in *Grosz v. City of Miami Beach*, Florida, 721 F.2d 729, 734 (11th cir. 1983), *cert. denied*, 469 U.S. 827 (1984), supports the conclusion that Collier County's interest in enforcing its zoning ordinances outweighs Plaintiffs' interest in operating a homeless shelter in that particular location.

Plaintiff's object to this analysis on the grounds that the Magistrate Judge's recommendation is vague, the *Grosz* decision is distinguishable, an evidentiary hearing is required, and that First Assembly's ability to establish a homeless shelter in other areas of the county is questionable. The Court is not persuaded by these arguments. Defendant Collier County has met its initial summary judgment burden of showing that it is entitled to judgment as a matter of law. Consequently, the burden shifts to Plaintiffs to "set forth specific facts showing that there is a genuine issue for trial." FED.R. CIV.P.56(e). Plaintiffs have responded with no such facts. Thus, summary judgment is appropriate on this claim.

**2. Procedural Due Process**

The Court, in its October 4, 1991 Order, also thoroughly discussed Plaintiffs' Due Process claim. The Court's position, as repeated by the Magistrate Judge, is

that the minimum requirements of procedural due process were properly met when Plaintiffs were given notice of and an opportunity to be heard regarding all of the enacted zoning ordinances. Plaintiffs in their objection assert no argument challenging the level of process received. Consequently, Plaintiffs have failed to state a claim upon which relief can be granted with regard to their due process claim.

## IV. ORDER

ACCORDINGLY, it is ordered that:

1) The Recommendation of United States Magistrate filed October 8, 1992, is ADOPTED;

2) Defendant Collier County's Motion To Dismiss filed on September 26, 1991, treated as a Motion for Summary Judgment, is GRANTED;

3) Defendant Hunter's Motion To Dismiss filed on September 18, 1991, treated as a Motion For Summary Judgment, is GRANTED;

4) Defendant Hunter's Motion For Rule 11 Sanctions filed on September 18, 1991, is DENIED;

5) The Clerk is DIRECTED to enter judgment for Defendants and against Plaintiffs; and

6) Each party is DIRECTED to bear their own costs.

DATED the [17th] day of [March], 1993.

BY THE COURT:

[Sherman G. Finesilver]
Sherman G. Finesilver,
Chief Judge
United States District
Court for
the District of Colorado
Sitting by Designation

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**FORT MYERS DIVISION**

FIRST ASSEMBLY OF GOD OF NAPLES, FLORIDA, INC., et al.,

Plaintiff,

vs.

CASE NO. 91-211-CIV-FTM-23D

COLLIER COUNTY, FLORIDA, et al.,

Defendant.

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**REPORT AND RECOMMENDATION**

This is an action for declaratory relief, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, brought by a church and residents of a homeless shelter at the church against Collier County, Florida and the Sheriff of Collier County. Before the Court are the Motion to Dismiss (Doc. 15) filed by the Sheriff of Collier County together with a Motion for Attorney's Fees (Doc. 15) and the Motion to Dismiss (Doc. 18) filed by Collier County. These motions were referred to this Court pursuant to an

Order (Doc. 30) filed May 1, 1992, by the Honorable Steven D. Merryday for a report and recommendation.

On October 4, 1991, the Honorable W. Terrell Hodges entered an Order (Doc. 20) denying the motion for preliminary injunction and also ruled on other aspects of the case. Judge Hodges dismissed without prejudice all the claims in the complaint seeking to declare the zoning ordinances null and void for lack of subject matter jurisdiction. Relevant to the motions to dismiss, Judge Hodges ruled,

> [T]he Court notes that the Defendants have moved to dismiss the complaint; and, given the reasons stated and the result reached in this order, it appears that summary judgment in favor of the Defendants with respect to Plaintiffs' federal constitutional claims may be appropriate. See Rule 12(b), F.R.Civ.P.

The parties were then ordered to show cause why summary judgment should not be entered in this case which they have done. The Court has carefully reviewed these pleadings and the transcript from the hearing before the Honorable W. Terrell Hodges.

FACTS [1/]

Plaintiff First Assembly of God of Naples, Florida, Inc. ("First Assembly") operates a homeless shelter on the grounds of its church. The church is located on a six acre

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[1/] This statement of facts was taken from the Order dated October 4, 1991.

parcel of land in Collier County, Florida in an area which it zoned RMF-6, for multi-family residential use. On November 15, 1983 First Assembly was granted a provisional use permit by the Collier County Board of Zoning Appeals to operate a church on the property. Collier County Zoning Ordinance 82-2, in effect at that time, defined a church as "a building used as a place of worship and religious education, and for customary accessory uses, by a body or organization of religious believers."

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In April, 1991, a county official charged that maintenance of the shelter constituted a zoning violation. The County Code Enforcement Board ("CEB") held five hearings on the matter and issued a written determination on August 12, 1991 that First Assembly was in violation of several zoning ordinances. The CEB found that the shelter was not a "customary accessory use" of the church property and that the applicable zoning and housing codes did not permit the premises to be used for housing the number of people residing at the shelter. The CEB further found that First Assembly had not applied for a provisional use permit to maintain a homeless shelter on its premises. First Assembly was required to correct the

violations by closing the shelter within three days or pay a fine of over $250 per day that the shelter remained open thereafter.

The shelter has now been closed. Plaintiffs assert that the mortgage holder on the church property threatened to foreclose on the mortgage if a lien was placed on the property by the county to recover any fines levied by the CEB. The defendants request that the Verified Complaint be dismissed for failure to state a cause of action upon which relief may be granted.

STANDARD FOR MOTION TO DISMISS AND SUMMARY JUDGMENT

The Court in its Order of october 4, 1991 determined that the motions to dismiss were motions for summary judgment. Under Fed.R.Civ.Pro. 56(c) a motion for summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party. *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328,1330 (11th Cir. 1988). The burden of establishing the absence of a genuine material fact is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) Once this burden is met the nonmoving party must "go beyond the pleadings and by her own affidavits, or by

the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324. When the nonmoving party fails to make a sufficient showing of an essential element of the case to which the nonmoving party has the burden of proof, the moving party is entitled to a judgment as a matter of law.

MOTION TO DISMISS (DOC. 15) BY SHERIFF DON HUNTER

The defendant, Don Hunter, Sheriff of Collier County moved to dismiss the Complaint on the grounds that it fails to state a claim upon which relief may be granted. This defendant claims that there are no allegations contained in the plaintiffs' Complaint that implicate the Sheriff as having violated the plaintiffs' constitutional rights or that this defendant engaged in conduct which would give rise to a civil action under the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and pursuant to U.S.C. § 1983, 1985 and 1988.

At the hearing held before Judge Hodges, counsel for the Sheriff stated that the Sheriff was named in the caption of the complaint but was not named as an actor in any of the paragraphs of the complaint except as "an oblique reference as being a privy with the county." (Transcript of 9/19/91 Hearing, p. 48). According to counsel, the Sheriff is only involved in enforcing the county ordinances in a foreclosure preceding which did

not occur in this case. The county or bank may call upon the sheriff's office in the event it needs to foreclose on a mortgage of the property owner. *Id.* at 49. The counsel for the Church claimed at the hearing that a violation of a county ordinance is a misdemeanor and the sheriff's office could arrest a violator. *Id.* at 51.

In the plaintiffs' responses to the motion for summary judgment, they did not address the issue of the sheriff and his relation to this case. From the pleadings and affidavits filed, it appears to the Court that the Sheriff has had no actual role in the closing of the shelter. Therefore, there are no material facts in dispute regarding the Sheriff's role in this matter.

The first issue that the Sheriff raised in his Motion to Dismiss was whether the plaintiffs alleged that there was a case or controversy against the Sheriff. For the plaintiffs to have standing in this case against the Sheriff, they must establish a "case or controversy" between themselves and the Sheriff.

> Plaintiffs in the federal courts must have a "personal stake in the outcome" of the case, *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct.691, 703, 7 L.Ed.2d 663 (1962), and "must allege some threatened or actual injury resulting from the putatively illegal action.'" *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). Abstract injury is not enough . . . The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *O'Shea v. Littleton*, 414

> U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974).' *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 984 (11th Cir. 1990)

There are three factors necessary to establish standing in a case. "First, the party asserting standing must have suffered actual injury or show the imminence of such injury." *Id.* at 984, quoting *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). "Abstract harm is insufficient, the litigant must establish 'actual or threatened injury." *Id.* "Second, the injury must be fairly traceable to the alleged unlawful conduct." *Id.* "Third, a demonstration must be made that the requested relief likely will redress the injury." *Id.*

In this case, [2/] the plaintiffs have failed to establish all three factors for asserting standing against the Sheriff. The plaintiffs have not alleged that they have suffered actual injury or will suffer imminent injury from the Sheriff, especially now that the shelter is closed. The plaintiffs have not established any actual or threatened injury from the Sheriff. No case or controversy has been established and the Motion to Dismiss (Doc. 15) [now

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[2/] Normally, the issue of standing would be addressed in a motion to dismiss. *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 983 (11th Cir. 1990) However, in this case, Judge Hodges stated in his October 4, 1991 Order that these motions would be considered as motions for summary judgment. Therefore, this Court has considered all the pleadings as well as all exhibits to the pleadings including the affidavits in support of the motions before reaching a decision.

considered a motion for summary judgment] should be granted.

MOTION TO DISMISS (DOC.18) BY COLLIER COUNTY

In its response to the Court Order of October 4, 1991, the defendant states that there is no genuine issue of material fact outstanding and judgment should be entered as a matter of law. According to case law, the Court must view all materials in a light most favorable to the non-moving party. [3/]

The Complaint alleges twelve counts against Collier County. These allegations may be broken down into two basic categories, namely as a violation of the "Free Exercise of Religion" Clause and as a violation of the "Procedural Due Process" Clause of the United States Constitution.

Free Exercise of Religion

The plaintiffs assert that there are material issues of fact that must be resolved and therefore the case is not properly considered for summary judgment.

The issue of free exercise of religion was

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[3/] **The Court has reviewed the plaintiffs' response to the Order to Show Cause. The plaintiffs attempt to list numerous material facts that are in dispute. After careful consideration, the Court can not agree that the facts listed are material. Some of the items listed as facts are actually questions of law which are properly determined in a motion for summary judgment.**

thoroughly discussed in Judge Hodge's Order dated October 4, 1991. According to the First Amendment to the United States Constitution, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." The First Amendment to the Constitution applies to the states through the Fourteenth Amendment to the Constitution. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). The court must balance the interests of the government in protecting the health, welfare and safety of its citizens against church's or individual's right to the free exercise of religion. The case of *Grosz v. Miami Beach*, 721 F.2d 729 (11th cir. 1983), *cert. denied*, 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed.2d 52 (1984) thoroughly analyzes the Supreme Court case law on the subject of free exercise of religion.

First, before the Court balances the competing governmental and religious interests, the government action must meet the two threshold tests. "The first test distinguishes government regulation of religious beliefs and opinions from restrictions affecting religious conduct. The government may never regulate religious beliefs; but, the Constitution does not prohibit absolute government regulation of religious conduct." *Grosz v. City of Miami Beach, Florida*, 721 F.2d 729, 733 (11th Cir. 1983). As in the *Grosz* case, the regulation in this case focuses on the conduct of the plaintiffs and not on the religious beliefs of the plaintiffs. Therefore, the County's zoning regulations and ordinances pass this first threshold.

"The second threshold principle requires that a law have both a secular purpose and a secular effect to pass constitutional muster. First, a law may not have a sectarian purpose -- governmental action violates the Constitution if it is based upon disagreement with religious tenets or practices, or if it is aimed at impeding religion." *Grosz v. City of Miami Beach, Florida*, 721 F.2d at 733, citing *Braunfeld v. Brown*, 366 U.S. 599, 607, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). In this case, the zoning ordinances show only secular purpose and have no sectarian nor discriminatory effect against the religious beliefs of the plaintiffs. The zoning ordinance regulates housing the homeless on church property and not one's belief in doing so. The ordinances clearly regulate conduct and not religious belief. "Second, a law violates the free exercise clause if the 'essential effect' of the government action is to influence negatively the pursuit of religious activity or the expression of religious belief." *Id.* at 733. As stated in the *Grosz* case, "[N]o one contends that zoning laws are based upon disagreement with religious tenets or are aimed at impeding religion. Similarly, given zoning's historical function in protecting public health and welfare, see *Village of Belle Terre v. Boraas*, 416 U.S.1, 94 S.C.t. 1536, 39 L.Ed.2d 797 (1974), and the incidental nature of the asserted burden on religion, the essential effect of zoning laws is clearly secular." *Id.* at 738. In this case also, the zoning laws affect the housing of homeless on a church's property which is conduct and are clearly secular in nature.

If the government passes the above two thresholds, then the court must balance the government interests against the impinged religious interest. "[t]he balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity." *Id.* at 734.

In *Grosz* as in this case the government activity is maintaining and enforcing its zoning codes. In *Grosz*, the Court held that preservation of government's ability to regulate zoning is "a significant governmental objective." *Id.* at 738. In its pleadings, the defendant argues that permitting the homeless shelter on the Church's property impinges on the county's ability to enforce its zoning, building and housing codes. This was the identical dilemma in *Grosz*. In the *Grosz* case, the plaintiffs were holding religious services in their converted garage which violated the City of Miami Beach's zoning ordinances. Collier County is concerned with the number of people that are residing in the shelter on the Church's property. The question then becomes, whether the County is able to effectuate its "policy through a nonburdening technique". *Id.* 734. To accomplish this, the County would have to make a religious based exception to the zoning ordinance which would permit religious organizations the right to establish homeless shelters on their property. In this case however, the plaintiffs have not shown the Court what would differentiate this shelter from other rooming houses or apartments. Therefore, the County would be placed

with the burden to permit any rooming house or apartment to be established in this zoned area if any religious affiliations were shown. As in *Grosz*, "the important objectives underlying zoning and the degree of infringement of those objectives caused by allowing the religious conduct to continue places a heavy weight on the government's side of the balancing scale." *Id.* at 739.

Next, the Court must evaluate the burden that the zoning ordinances have on religion. To evaluate the burden on religion, the Court must inquire into "[T]he importance of the burdened practice within the particular religion's doctrines and the degree of interference caused by the government..." *Id.* at 735. Plaintiffs attempt to indicate that a homeless shelter is a significant part of their religious practice through their additional affidavits. As Judge Hodges stated, "First Assembly operated the church for eight years but did not open the shelter until November, 1990, suggesting that it is not an essential part of Plaintiffs' religious practices." (Doc. 20, p. 9-10). In the affidavit of Pastor Mallory, he stated that the homeless shelter is part of the Church's mission yet he also states that the mission is "to feed and clothe those in need." (Doc. 26, Affidavit Mallory, p.1-2) Presumably, the Church may fulfill its mission through other means. The other affidavits all support Pastor Mallory in his belief that the homeless shelter is part of the Church's mission. For the County to enforce its zoning ordinances, the burden on the Church to maintain a homeless shelter would be the cost of relocating it to a different area in the

County that would allow homeless shelters.[4/] Presumably, in this case, the Church is able to establish a homeless shelter in other areas of the County. This burden on the Church "plainly does not rise to the level of criminal liability, loss of livelihood, or denial of basic income sustaining public welfare benefit. In comparison to the religious infringements analyzed in previous free exercise cases the burden here stands towards the lower end of the spectrum." *Id.* at 739.

Regarding the equal protection argument made in the Complaint, the plaintiffs have shown no facts to support their allegations. There are no other churches or organizations similarly situated that have homeless shelters in their zoned area. In addition, the Church has not shown that if it chooses to relocate its homeless shelter to a properly zoned area that the County would deny them the right to establish it.

Procedural Due Process

In the Complaint, the plaintiffs mix procedural due process claims with their other claims. Again, in his Order of October 4, 1991, Judge Hodges thoroughly discusses how to establish a procedural due process claim. As stated in that Order, to establish a procedural due process claim, the plaintiffs must first show that they had

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[4/] In *Grosz*, the alternative for the religious organization if the City was able to maintain its zoning ordinance was to require the Groszs to relocate their services in an area that was zoned to allow religious services.

a "liberty or property interest which was interfered with by the state, and second, that the state failed to use constitutionally sufficient procedures in depriving plaintiffs of that right. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904, 1908, 104 L.Ed.2d 506(1989)." (Doc. 20, p. 13) In addition, life, liberty and property cannot be taken by a statute whose terms were "so vague, indefinite and uncertain" that their meaning could not be determined. *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939), and in this case, the terms "customary accessory uses" are definite enough for the church to be aware that the shelter had to be an essential part of the Church's religious practice. The Court goes on to state that the plaintiffs were correct in arguing that the "initial determination of whether they have a protectable property interest is governed by state law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985)." The heart of the matter in this case, however is that "the state statute does not define the process due under the federal Constitution. Therefore, even if the state statute has been violated, that does not prove a violation of a federal constitutional right." *Harris v. Birmingham Board of Education*, 817 F.2d 1525, 1527-1528 (11th Cir. 1987) In this case, at the hearing, the plaintiffs admitted that they received notice and an opportunity to be heard regarding all of the enacted zoning ordinances. (p. 23, Transcript of September 19, 1991 hearing) There is no factual dispute as to the notice and opportunity to be heard. The receipt

of notice and a right to be heard is at a minimum all the due process clause requires. *Armstrong v. Manzo*, 380 U.S. 545, 549, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

Bill of Attainder, Count X

In Count X of the Complaint, the plaintiffs allege that Ordinance 91-34 is a Bill of Attainder. The plaintiffs allege that prior to the Church establishing a homeless shelter, there was no legislation against having homeless shelters as a provisional use of a church. These facts are not in dispute. The plaintiff, however failed to mentioned in this Count that another church albeit in another zoning district is running a homeless shelter. (See, paragraph 112 of the Complaint)

"No Bill of Attainder or ex post facto Law shall be passed". Art. I, §9, cl.3. A Bill of Attainder is a legislative act inflicting punishment on a specific group by a deprivation of a right previously enjoyed. *United States v. Brown*, 381 U.S. 447, 448 (1965). According to paragraph 22 of the Complaint, Zoning Ordinance 91-34 defines a homeless shelter as a group home and established regulations for homeless shelters. Zoning Ordinance, 91-34 is not punitive in nature and does not single out this Church or this Shelter for criminal punishment. Instead, the Zoning Ordinance simply regulates homeless shelters in general for the health, welfare and safety of the citizens. The plaintiffs have not shown that this ordinance falls within the group of laws that has been declared as constitutionally impermissible bills of attainder.

MOTION FOR ATTORNEYS FEES (DOC. 15)

The Sheriff of Collier County seeks costs and attorney's fees under Rule 11. As stated in his motion, Rule 11 is imposed to deter frivolous claims and meritless matters. *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 852 (11th Cir. 1988). At the hearing on September 19, 1991, the plaintiffs articulated reasons for their inclusion of the Sheriff as a party defendant. The plaintiff's joining of the Sheriff does not rise to the level of a frivolous claim.

CONCLUSION

Therefore, it is respectfully recommended that the Motions to Dismiss (Docs. 15 and 18) now considered a Motion for Summary Judgment be GRANTED and the Motion for Attorneys Fees (Doc. 15) be DENIED.

Dated: [Oct. 8th, 1992]

[George T. Swartz]

GEORGE T. SWARTZ
UNITED STATES MAGISTRATE

# PUBLIC LAW 103-141

103rd Congress -- 1st Session
(Enacted November 16, 1993; codified in Sections of 5 U.S.C. and 42 U.S.C.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings.--The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking

sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes.--The purposes of this Act are--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General.--Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception.--Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief.-- A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under

this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) Judicial Proceedings.--Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

(b) Administrative Proceedings.--Section 504(b)(1)(C) of title 5, United States Code, is amended--

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

SEC. 5. DEFINITIONS. As used in this Act--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) In General.--This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) Rule of Construction.--Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) Religious Belief Unaffected.--Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

# COLLIER COUNTY ZONING ORDINANCE NO. 82-2 (EXCERPTS)

AN ORDINANCE ENACTING AND ESTABLISHING ZONING REGULATIONS FOR THE UNINCORPORATED AREA OF COLLIER COUNTY, FLORIDA . . .

* * * * * * *

7.12 RMF-6 - Residential Multi-Family District:

* * * * * * *

b. Uses and Structures: No building or structure, or part thereof, shall be erected, altered or used, or land or water used, in whole or in part, for other than the following:

* * * * * * *

3) Permitted Provisional Uses and Structures:

(a) Churches.

(b) Schools.

(c) Owner occupied child care centers. (Subject to Section 8.48)

(d) Civic and cultural facilities.

(e) Recreational facilities not accessory to principal use.

(f) Rest homes, homes for the aged, adult foster homes, hospices, children's homes, rehabilitation centers.

(g) Non-commercial boat launching facilities.

* * * * * * *

SECTION 20. DEFINITIONS:

* * * * * * *

Church: A building used as a place of worship and religious education, and for customary accessory uses, by a body or organization of religious believers.

**COLLIER COUNTY ZONING ORDINANCE NO. 91-34**
**(EXCERPTS)**
(Adopted April 16, 1991)

AN ORDINANCE AMENDING ORDINANCE NUMBER 82-2, THE COMPREHENSIVE ZONING REGULATIONS FOR THE UNINCORPORATED AREA OF COLLIER COUNTY, FLORIDA . . .

* * * * * * *

SECTION EIGHT:

Ordinance 82-2, the Comprehensive Zoning Regulations for the Unincorporated Area of Collier County, Florida, Section 7.12, RMF-6-Residential Multi-Family District, Subsection 7.12b.3), Permitted Provisional Uses and Structures, is hereby amended by amending Provisional Use (f) to delete rest homes, homes for the aged, adult foster homes, hospices, children's homes, and rehabilitation centers and to add Group Care Facilities (Category I and Category II), as follows:

(f) ~~Rest Homes, homes for the aged, adult foster homes, hospices, children's homes, rehabilitation centers~~ Group Care Facilities (Category I and Category II) (subject to Section 8.53).

* * * * * * *

SECTION TWENTY-FOUR:

Ordinance 82-2, the Comprehensive Zoning Regulations for the Unincorporated Area of Collier County, Florida, is hereby amended to add a new Section, Section 8.53, Location Requirements for Group Housing, to read as follows:

8.53 Location Requirements for Group Housing:

a. All Group Housing structures shall meet the following requirements in addition to the requirements specified for each type of structure:

1) Site Development Plan (SDP) approval in conformance with Section 10.5 of Zoning Ordinance 82.2, as amended (with the exception of a Family Care Facility).

2) All applicable State and County building and fire code standards.

3) All applicable State and County licensing requirements.

* * * * * * *

c. Group Care Facility (Category I and Category II):

A Group Care Facility shall be governed by

the development standards identified in the zoning district assigned to the property and the following standards:

1) Minimum Habitable Floor Area: 1,500 square feet plus 200 square feet per live-in person, beginning with the seventh live-in person.

2) Minimum Lot Area: 6,000 square feet plus 1,500 square feet per live-in person, beginning with the seventh live-in person.

3) Parking Required: 2 parking spaces per 5 beds (Minimum requirement: 2 parking spaces).

4) Separation Requirements:

a) A new Group Care Facility shall be required to be located greater than a radius of 1,200 feet from any other existing Group Care Facility (applicable to the RMF-6, RMF-12, RMF-16, RT, and VR zoning districts).

b) A new Group Care Facility shall be required to be located greater than a radius of 500 feet from any other existing Group Care Facility (applicable to the A-2, Estates, and RSF 1-5 zoning districts).

c) Distance requirements shall be

measured along a straight line from the nearest point of the existing Group Care Facility to the nearest point of the proposed new Group Care Facility.

5) Special Setback Requirements: No structure shall be erected within 20 feet of any abutting lot or parcel which is zoned residential, nor within 25 feet of a road right-of-way.

6) Landscaping Requirements: As per Sections 8.30 and 8.37 or as may be deemed appropriate during site development plan review.

* * * * * * *

SECTION TWENTY-SEVEN:

Ordinance 82-2, the Comprehensive Zoning Regulations for the Unincorporated Area of Collier County, Florida, Section 20, Definitions, shall be amended to add the definitions of "Adult Congregate Living Facility (ACLF)", "Care Unit", "Family Care Facility", "Group Care Facility (Category I and Category II)", "Group Home", "Group Housing", and "Group Housing Unit" in alphabetical order as follows:

* * * * * * *

Group Care Facility: A type of facility, which provides a living environment for seven (7) to fourteen (14) unrelated residents who operate as the functional

equivalent of a family, including such supervision and care by supportive staff as may be necessary to meet the physical, emotional, and social needs of the residents.

* * * * * * *

b. Category II: A Group Care Facility designed to accommodate seven (7) to fourteen (14) cared for residents, plus not more than four (4) live-in supervisors. This type of facility offers a higher level of personal and therapeutic care than a Category I facility (i.e., crisis and attention care, displaced adult care, homeless shelters, mental health care, offender halfway houses, spouse abuse care, substance abuse care, and youth shelters).

**BEFORE THE CODE ENFORCEMENT BOARD OF COLLIER COUNTY, FLORIDA**

| | | |
|---|---|---|
| BOARD OF COUNTY COMMISSIONERS OF COLLIER COUNTY, FLORIDA, | ) | |
| Petitioner, | ) | CEB #: 90-013 |
| vs. | ) | |
| FIRST ASSEMBLY OF GOD OF NAPLES, FLORIDA, INC. | ) | |
| Respondent. | ) | |

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD**

THIS CAUSE came on for public hearings before the Board on May 30, 1991, June 10, 1991, and June 21, 1991, and the Board having heard testimony under oath, received evidence, considered memoranda of law, and heard arguments respective to all appropriate matters, thereupon issues its Findings of Fact, Conclusions of Law and Order of the Board as follows:

## FINDINGS OF FACT

1. That the Respondent, FIRST ASSEMBLY OF GOD OF NAPLES, FLORIDA, INC., is the owner of record of the real property described in the attached Exhibit "A", which is incorporated by reference herein (hereinafter "subject property"), and that the subject property lies in the RMF-6 zoning district.

2. That the Code Enforcement Board has jurisdiction over the subject property and jurisdiction over the Respondent corporation, that Respondent's President, David J. Mallory, was present at the public hearings on behalf of Respondent, and that Respondent was represented by legal counsel at the public hearings.

3. That all notices required by Collier County Ordinance No. 88-89 ("Collier County Code Enforcement Board Ordinance") have been properly issued.

4. That the subject property is in violation of the following Collier County Ordinances, as hereinafter specified:

A. Ordinance No. 82-2 ("Collier County Zoning Ordinance"), Sections 10.2, 10.7 and Ordinance No. 90-75 ("Collier County Building Code"), Sections A103.1.1.1 and A107.

That the testimony of witnesses and evidence presented showed the Respondent converted and remodeled building formerly used for day care to use as homeless shelter without applying for and receiving written approval of building permit by the Zoning Director that the

plans submitted conform to applicable zoning regulations, in violation of Section 10.2 of Ordinance No. 82-2.

That the testimony of witnesses and evidence presented showed the Respondent improved the subject property and engaged in construction on the subject property without applying for and prior to having been issued the required building permit in violation of Section 10.7 of Ordinance No. 82-2.

That testimony and evidence presented showed Respondent remodeled a structure on the subject property without first obtaining the required building permits, in violation of Section A103.1.1.1 and A107 of Ordinance No. 90-75.

B. Ordinance No. 89-06 ("Collier County Housing Code"), Section 5.

That the testimony of witnesses and evidence presented showed the Respondent to be in violation of Section (5) subsection 13 of Ordinance 89-06 (Collier County Housing Code) by allowing too many occupants to occupy the subject "DWELLING" which did not contain the minimum floor space requirements for the number of occupants occupying said "Dwelling."

1. Ordinance No. 82-2 ("Collier County Zoning Ordinance"), Sections 7.12.b.4 and 13.

That the testimony and witnesses and evidence presented showed the Respondent is using the subject

property for a homeless shelter, and that Respondent failed to apply for and receive Provisional Use approval of Petitioner to use the subject property for a homeless shelter, in violation of Sections 7.12.b.4 and 13 of Ordinance No. 82-2 and in violation of the previously approved Provisional Use (PU-83-21C, Resolution No. 83-203) for the subject property issued pursuant to the afore-referenced sections of Ordinance No. 82-2.

5. That the testimony of witnesses and evidence presented showed that a homeless shelter is not a customary accessory use to a church under Ordinance No. 82-2.

6. That the testimony of witnesses and evidence presented showed that a homeless shelter is not a customary accessory use to the previously approved Provisional Use for the subject property.

7. That the Petitioner has made a legislative determination to regulate and classify a homeless shelter as a use which requires a Provisional Use in the RMF-6 zoning district.

## CONCLUSIONS OF LAW

1. That the Respondent, FIRST ASSEMBLY OF GOD OF NAPLES, INC., is in violation of:

A. Ordinance No. 82-2 ("Collier County Zoning Ordinance"), Sections 10.2, 10.7, 7.12.b.4, and 13;

B. Ordinance No. 89-06 ("Collier County Housing Code"), Section 5;

C. Ordinance No. 90-75 ("Collier County Building Code"), Sections A103.1.1.1, A107.

2. That the Respondent is required to and failed to obtain Provisional Use approval from the Petitioner in order to add operation of a homeless shelter, a new land use and a change in occupancy from its previously approved Provisional Use (PU-83-21C, Resolution No. 83-203) for the subject property zoned RMF-6.

3. That the homeless shelter is not a customary accessory use to a church.

4. That the homeless shelter is not a customary accessory use to the Provisional Use previously approved by Petitioner for Respondent's property.

5. That the Board is bound by the written interpretation of the Petitioner's Zoning Director (Planning Services Manager) that a homeless shelter is not a customary accessory use to the previously approved Provisional Use.

6. That the Board does not have jurisdiction to consider or rule upon federal or state constitutional issues.

7. That Respondent may avail itself of alternative administrative remedies.

8. That adoption of zoning laws and regulations and classification of uses therein is a local legislative function, and that regulation and classification of uses by one local legislative body may differ from that of another local legislative body.

**ORDER OF THE BOARD**

Based upon the foregoing Findings of Fact and Conclusions of Law, and pursuant to the authority granted in Chapter 162, Florida Statutes, and Collier County Ordinance No. 88-89, it is hereby ORDERED:

1. That the Respondent correct the violations on or before August 15, 1991.

2. That in the event Respondent does not comply with this Order and correct the violations on or before August 15, 1991, Respondent is hereby order to pay a fine of $250.00 per day for each and every day the operation of a homeless shelter continues at the subject location is in violation of Ordinance No. 82-2, Sections 7.12.b.4 and 13 continues past said date and a fine of $50.00 per day per person (in excess of 17 occupants) for each and every day the violation of Ordinance No. 89-06 continues past said date. That a fine of $25.00 per day past said date that Respondent fails to obtain the required building permit in violation of Ordinances 82-2 and 90-75.

3. That up to and including August 15, 1991, the Respondent shall comply with each and every term and condition set forth in the attached Stipulation of First Assembly of God of Naples, Inc., which is incorporated by reference herein as Exhibit "B".

4. That at any time on or before August 15, 1991, Petitioner or Respondent may file a request for the Code Enforcement Board to reconvene for the purpose of rehearing and reconsidering the date when violations must be corrected, the amount of the fines, and/or considering

such other matters as may be appropriate, including but not limited to enforcement of terms and conditions in the Stipulation identified as Exhibit "B"; and to that end, the Code Enforcement Board hereby reserves its jurisdiction.

Failure to comply with the Order within the specified time will result in the recordation of a lien pursuant to Chapter 162, Florida Statutes, which may be foreclosed, and the Respondent's property sold to enforce the lien.

DONE AND ORDERED this [30th] day of [June], 1991, at Collier County, Florida.

CODE ENFORCEMENT BOARD
COLLIER COUNTY, FLORIDA

By: [Monte Lazarus]
Monte Lazarus, Chairman

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Findings of Fact, Conclusions of Law and Order of the Board has been furnished by U.S. Mail to Respondent FIRST ASSEMBLY OF GOD OF NAPLES, FLORIDA, INC., Attention: David J. Mallory, President, 2132 Shadowlawn Drive, Naples, Florida 33942; and FREDERICK C. KRAMER, ESQUIRE, Frost & Jacobs, Post Office Box 1576, Marco Island, Florida 33969-1576, on this [1] day of [July], 1991.

Maria Cruz
Secretary/Code Enforcement Board

ATTENTION:

It is the responsibility of the Respondents to notify the Code Enforcement Board through the Collier County Compliance Services Department, 2800 North Horseshoe Drive, Naples, Florida 33942, and satisfactorily demonstrate that the violations have ceased.

# MEMORANDUM

TO: Dick Clark
Code Enforcement Supervisor

FROM: Kenneth W. Baginski
Planning Services Manager

DATE: May 16, 1991

RE: Status of Homeless Center
at 2132 Shadowlawn Rd, Naples, FL

Approval of a provisional use by the Board of County Commissioners is required for this site prior to conducting a homeless shelter on this site. No such provisional use has been obtained.

Per Collier County Ordinance 91-34 homeless shelter usage is classified as a Group Care facility, Category II. Such facilities are allowed in RMF-6 zoned districts after approval of a Provisional Use by the Board of County Commissioners. No such approval has been obtained for the above-referenced location which is situated in an RMF-6 zoned district.

Provisional Use #83-21-C was obtained for a "Church" at this location. Collier County Zoning Ordinance 82-2 defines "Church" as "a building used as a place of worship and religious education, and for customary accessory uses, by a body or organization of religious believers." The

existence of a homeless shelter is not allowed as it is not a customary accessory use. The American Heritage Dictionary defines "Customary" 1. commonly practiced or used as a matter of course; usual"

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SECTION: Part A; Page 32; Column 1; Advance Desk

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HEADLINE: MICHIGAN'S MOVABLE SHELTERS GIVE AID, COMFORT TO THE DOWN AND OUT; HOMELESS: SOME CHURCHES TAKE TURNS HOSTING THE OPERATION. CLIENTS GET FOOD AND A BED; VOLUNTEERS GET TO SEE THAT SOCIETAL PROBLEM HAS HUMAN FACE.

BYLINE: By JUDY DAUBENMIER, ASSOCIATED PRESS DATELINE: FOWLERVILLE, Mich.

BODY:

Steve Smith's bed for the night was a cot covered with a green army blanket in the corner of a Sunday school room at St. John Evangelical Lutheran Church.

In a few days, Smith, the cot and his tiny pile of toiletries would be someplace else -- another Sunday school room, a congregation's meeting hall, a church's unused basement.

Like 19th-Century ministers who traveled a circuit preaching the Gospel to their far-flung flocks, an

estimated 25 shelters for Michigan's homeless travel from church to church, depending on the kindness of church volunteers.

The arrangement is not limited to Michigan.

"It's definitely all over the country," said Robert Ogilvie, director of volunteers for the Partnership for the Homeless in New York City. Fifty New York churches working with Ogilvie's organization trade off nights as homeless shelters, he said.

There's just not enough permanent shelters for people," said Maj. Carl Reed of the Lansing Salvation Army. "I'm not sure anybody thinks it's the greatest idea, but it's done out of need."

Organizers insist that they at least provide the poor a warm bed and hot meal, and provide the church volunteers a new insight into problems of the needy.

You'd think that a shelter that moves every week and where you can't stay during the day would be a horrible place to live," said the Rev. Pam Fulton, a Presbyterian minister, director of Advent House Ministries and co-chair of the Lansing Area Rotating Sanctuary.

"You're not settled. You have to keep moving, getting used to a whole new group of volunteers and new ways of doing things," she said. "But it's often the shelter of choice."

Women and children prefer the Lansing traveling shelter because of the attention lavished by volunteers, the less institutional atmosphere and the greater sense of safety, she said.

Churches take turns hosting the shelter for a week or two at a time. Each evening, volunteers transport guests from a welfare agency or other office to the church hosting the shelter. There they receive a hot meal donated by a church volunteer and a cot to sleep on.

Breakfast is served in the morning. Then the guests pick up a sack lunch and leave for the day. In some areas, they are given bus tokens for transportation. Some churches provide transportation back to the place where they were picked up the night before.

At the end of the week, volunteers pack up the cots and bedding and ship them to the next church, along with the guests' belongings.

In Fowlerville, St. John hosts the Livingston County shelter two weeks a year at a cost to the congregation of about $300, including the pots of chili and pans of lasagna that volunteers bring.

"It makes you appreciate what you have," said Eliisa Walter of Webberville, one of four volunteers at the St. John kitchen. "You realize that they're real people. They're not just bums, drunks. They're just people that have had some bad luck. Most of them are really nice people."

Some of them, like Steve Smith, have jobs. He works at a fast-food restaurant in Fowlerville, trying to save money to get his own apartment, but had been sleeping in friends' cars for several weeks.

Though Smith, 20, previously had worked for a lawn-maintenance and snowplowing company, he never

managed his money well enough to afford his own place and he ran out of friends to stay with.

He appreciated the warm place to stay and the good food, but the roving shelter could pose a problem for him, because he may have to sleep miles away from his job with no public transportation to get him there.

"It'd be nice if we stayed here," he said after a home-cooked dinner of pot roast, potatoes and carrots. "It moves and that's not good for me. If I have to, I'm willing to walk or hitchhike, but I ain't going to lose my job."

Inconvenience is not the only criticism of the movable shelters. They're a good stopgap to help the homeless, says Beverley McDonald, executive director of the Michigan League for Human Services, but that's not enough.

"I certainly would not want to diminish their contribution. However, I think that we have to look at why they're there and how we can get them (the homeless) into more permanent situations," she said.

Still, there are unique benefits to the rotating shelters -- and not only for the homeless.

Lillian Melville, executive director of the South Oakland Shelter -- the only shelter in the 25 miles between Detroit and Pontiac -- says the volunteers shed preconceived notions of the homeless as unwashed, crazy derelicts.

"That stereotype exists, but you are not expecting a mother and a 2-day-old baby. You're not expecting somebody you went to high school with, and that has

happened. You're not expecting a mom and dad where the dad is doing dishes because he just wants to thank you," she said.

"Even if it is that stereotypical person, all of a sudden this old drunk is 'Charlie,' and Charlie is a person."

Fulton, of the Lansing shelter, said middle-class volunteers sometimes have helped shelter residents find jobs or persuaded congregations to get involved in homeless issues in other ways after glimpsing the problem up close.

"I've just talked to so many people who say, 'I didn't know there was so much suffering,' or, 'I don't know how they survive,' " she said. "Some have said, 'My life will never be the same again.' There's been a real awakening."

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NORTHWEST SPORTS FINAL EDITION

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LENGTH: 867 words

# HEADLINE: CHURCH, CITY AT ODDS OVER HOMELESS

BYLINE: By Colin McMahon

BODY:

The dispute between Schaumburg officials and a Lutheran church seems more suited for "L.A. Law" than a meeting of the village Zoning Board of Appeals.

The topics churned up run from separation of church and state to the Judeo-Christian tradition of sheltering the sojourner.

And in the middle are a small group of dispossessed people who, literally and figuratively, are out of place in the booming northwest suburbs - the homeless.

At issue is whether Prince of Peace Lutheran Church needs a special-use zoning permit to operate a homeless shelter as part of the PADS (Public Action to Deliver Shelter) network.

Schaumburg Planning Director Thomas Koenig, ruling that the shelter is a special use of the church and therefore a matter for public hearings, says it does. The church, asserting that the shelter is part of its ministry and therefore not subject to government regulation, says it does not.

The Zoning Board of Appeals, which heard 3 1/2 hours of testimony on the subject last week before a packed meeting room, will reconvene Wednesday night to hear the village's side of the story.

Last week's meeting provided good theater for the nearly 200 people who packed the village meeting hall and made clear their support for Prince of Peace, often with applause, sometimes with murmurs of disapproval aimed at the village.

Assistant Village Atty. Rita Elsner, the subject of some of those murmurs, said Tuesday that such issues as church and state and a moral duty to help the homeless are secondary.

"It's strictly a zoning question," Elsner said. "We're not disputing, arguing with or denigrating the mission of the church."

Elsner said that neither she nor Koenig is against the operation of the shelter and that the village staff "would recommend that the special-use permit be granted" if Prince of Peace applied.

That, said lawyers for the church, is not going to happen.

If the zoning board rules against Prince of Peace,

the church will appeal immediately in Cook County Circuit Court rather than seek the permit, said Jonathan Baum of the Loop law firm Sidley & Austin, which is representing the church without charge.

If that appeal fails, Baum said, "We'll take this to the Supreme Court if we have to."

Prince of Peace, 930 W. Higgins Rd., is one of more than 60 churches in 38 communities in Northern Illinois that serves the homeless through PADS, which began in 1982.

The churches alternate nights (Prince of Peace provides shelter every Friday) and operate under a uniform set of rules. Churches throughout the Northwest suburbs, including Barrington, Arlington Heights, Mt. Prospect, Palatine and Rolling Meadows, participate.

"All of this worked fine until they hit Schaumburg," Baum said.

Prince of Peace asserts that it has the right to operate the shelter under an accessory-use provision of Schaumburg law that allows such activities as Sunday school or youth counseling.

To back up that argument, the church's lawyers called on Martin Murphy, who served four years as planning commissioner for the city of Chicago.

Murphy testified that Chicago has never demanded that a church get a special permit to operate a shelter on its property. He also said that, by his reading of the Schaumburg zoning ordinance, Prince of Peace shouldn't have to either.

Sheltering the homeless is part of their basic worship," Murphy said Tuesday. "It's not for me or the village to decide. It's for them to decide."

Murphy said he based that judgment in part on the testimony of clergy members who appeared at the hearing.

Rev. Thomas Strieter, pastor at Trinity Lutheran Church in Chicago who teaches theology at Loyola University, delivered an eloquent overview of the biblical principle of hospitality - being open to the vulnerable.

"Hospitality is at the essence of the church's mission," Strieter said. "The church does not ask for permission of the state, and on occasion has fought the state in a nonviolent way when the state has gotten in the way of that hospitality mission."

The appeal to the zoning board, which is made up of residents appointed by Village President Al Larson, is the first-ever challenge of an administrative determination, Koenig said.

Baum, a constitutional law expert, said it's an important one.

"What we're saying is if the village looks so narrowly on the ordinance as to exclude this program, then this village is violating the church's constitutional right to free expression of its religion," Baum said.

"The issue here is critically important on a practical level because if we lose, this will have a chilling effect on other churches participating in the program."

Prince of Peace has been operating the shelter since Oct. 5 while its appeal is pending. It has drawn from

6 to 12 homeless people each Friday night, Pastor R. W. Anderson said.

The congregation, which has produced dozens of volunteers for the shelter, has been "overwhelmingly supportive" of the fight, Anderson said Tuesday.

"It's a case of not being able to have the village direct the ministry of the congregation, or have a veto over the ministry of the congregation," he said. "That's what we really fear."

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ULSTER

In the Matter of the Application of :
TRINITY UNITED METHODIST CHURCH,
FAMILY OF WOODSTOCK, INC., and the :
EXECUTIVE COMMITTEE OF THE KINGSTON
AREA COUNCIL OF CHURCHES :

Petitioners, :

-against- :

CITY OF KINGSTON ZONING BOARD OF APPEALS,
:

Respondent.

(Supreme Court, Ulster County Special Term,
May 27, 1983. Calendar No. 90)

(JUSTICE GEORGE L. COBB PRESIDING)

APPEARANCES:

Wapner, Koplovitz & Futerfas
(Joshua N. Koplovitz of counsel),
for petitioners.

Andrew John Gilday, Corporation Counsel,
for respondent.

COBB, J.

The petitioners have commenced the instant article 78 proceeding to annul the determination made by the respondent Zoning Board of Appeals which required the petitioners to obtain a variance for a temporary emergency shelter to be housed in the Trinity United Methodist Church and denied such variance.

The petitioners contend that pursuant to the zoning ordinance of the City of Kingston no variance is required and thatfurthermore, even if a variance is required, the petitioners have made a sufficient showing of hardship to require the issuance of a variance. Section 3-1.1.3 of the Zoning Ordinance of the City of Kingston provides that in section R-1 in which the Trinity United Methodist Church is located "places of worship, including parish houses and religious school buildings * * * including uses customarily accessory thereto" are allowed. In the opinion of this court, the temporary emergency shelter is an accessory use to the church and does not require a variance.

The Court of Appeals in *Matter of Community Synagogue v. Bates* (1 N Y 2d 445, 453) held that church uses are not restricted to use merely for prayer and/or sacrifice and relied upon the Old Testament for the proposition that the congregation is strengthened through social activities. The court further stated that the church

could not act as a country club, i.e., with no purpose other than entertainment and that each case rests upon its own fact situation (p. 453). In determining whether specific uses are accessory religious uses, the courts have upheld a drug counseling center on the ground that the drug problem involves the mental, moral and spiritual health of the community and congregation, citing statements by church leaders and others that the drug problem is a religious problem (*Slevin v. Long Is. Jewish Med. Center*, 66 Misc 2d 312), a day care center (*Matter of Unitarian Universalist Church v. Shorten* (63 Misc 2d 978) and the teaching of secular subjects in church buildings (*Westbury Hebrew Congregation v. Downer*, 59 Misc 2d 387). A similar use, a home for the developmentally disabled, was held not be a religious use in *Diocese of Buffalo v. Buczkowski* (112 Misc 2d 336). The court stated that such a home was a charitable community minded use but not a religious use. However, the holding was based upon the principle that religious purposes may include such uses "only when such uses are merely accessory and ancillary to the principal uses of a structure as a place of worship". The building involved was not a church. "[W]here the sole use of the premises is for such charitable use, the use is not religious, and is, thus, not subject to First Amendment protection" (p. 342).

In the instant case, the petitioners seek to modify the basement of the church and turn it into a temporary emergency housing unit for approximately 21 needy and homeless persons. All normal church functions will be

carried or on the main floor of the building. The court recognizes the historic role of the church in providing care and shelter for the poor and needy. The petitioners have also shown that many churches throughout the area have instituted programs to provide temporary emergency shelter for indigents. It is therefore determined that the proposed use of the temporary emergency shelter is an accessory use to the use of the building as a church and that it is a permitted use in the R-1 zoning district under the City of Kingston Zoning Ordinance.

Furthermore, the proposed use has a religious purpose and is therefore constitutionally protected from restrictions upon such use (*Matter of Diocese of Rochester v. Planning Board*, 1 N Y 2d 508, 523) unless there is a convincing showing of a direct and immediate adverse effect upon the health, safety or welfare of the community (*Matter of Westchester Reform Temple v. Brown*, 22 N Y 2d 488, 494). The respondent has failed to make such a showing.

Accordingly, the respondent's determination that a variance is required before the petitioners may utilize the basement of the Trinity United Methodist Church as a temporary emergency shelter for the indigent was arbitrary and capricious and contrary to law. Such decision is hereby annulled.

Submit judgment on notice.

Dated: August 11, 1983

All papers to attorneys for petitioners.